

# Legal/Regulatory Framework for CO<sub>2</sub> Capture & Storage

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# Some Key CCS Issue Areas

- **Jurisdiction**
  - *Federal or Montana?*
  - *And if Montana, which State agency(ies)?*
- **Liability**
  - *Must be addressed*
  - *What role, if any, does Montana want to play?*
- **Ownership**
  - *Who owns the pore space?*
- **Costs**
  - *Who is going to pay for all of this?*



# Jurisdiction over CCS Regulation

- What is federal EPA doing?
  - *UIC guidance for demonstration projects*
  - *Broader rulemaking on the way*
- Compare that with the IOGCC approach
- What have other States already done or are contemplating
  - *Wyoming*
  - *California*
  - *Texas*
  - *Illinois*
  - *Washington*
  - *Others*
- Specific considerations for Montana
  - *Do you want to pursue demonstration or commercial projects?*
  - *How do you intend to treat CO<sub>2</sub>-EOR?*



# EPA's UIC Injection Guidance

- Guidance issued March 1, 2007
- Assumes pilot projects and small injection volumes
- Class V experimental technology
- Sounds a note of caution about CO<sub>2</sub>-EOR post injection/recovery operations



# EPA's CCS Rulemaking

- SDWA regulates underground injection: “subsurface emplacement of fluids”
  - *Including gases*
- SDWA requires EPA to establish minimum requirements for programs
- Programs administered by state or Feds
  - *MT has shared jurisdiction*
- EPA is preparing draft UIC regulations for injection, storage portions of CCS projects
- A key legal question: Does the SDWA provide EPA with sufficient authority to implement the rules in the first instance?



# EPA's CCS Rulemaking

- Proposed rule: July 2008
- Final rule: late 2010-early 2011
- Proposed rule to include:
  - *Minimum standards for CO<sub>2</sub> injection, storage: permitting system*
  - *Regulations must be tied to demonstration of “non-endangerment” of USDW (actual and potential)*
  - *Will likely set out permitting framework, long-term MMV requirements, and related financial assurance*
  - *“Permit shield” concept may be included in SDWA*



# EPA's CCS Rulemaking

- Where is EPA heading?
  - *Possible new UIC class*
  - *Although it may be defined differently, could look like hazardous Class I*
- Likely cannot address (as a matter of law):
  - *Capture*
  - *Transportation*
  - *Property rights/mineral rights issues*
  - *Long-term storage liability*
  - *Tort/common law risks*
- Possible effects on MT:
  - *Tradition “State” issues to be left to the States*
  - *Relationship between federal rules and MT law/regulations*



# Compare: IOGCC Approach

- Contemplates state legislative/regulatory scheme for injection, storage
- Covers aspects of SDWA, plus much more
- If MT went this route, the State presumably would select agency to oversee program (MDEQ or MBOGC, or both)
  - *Not necessarily agency with UIC program jurisdiction*
  - *Issues of primacy may need to be addressed, but mechanisms are in place*



# Compare: IOGCC Approach

- Includes mechanism to obtain property rights
  - *Leaves open issue of who actually holds potentially affected rights*
- After closure, post-closure, ownership of stored CO<sub>2</sub> transfers to State
  - *Release from further responsibility vis-à-vis state regulatory authority*
  - *Is Montana ready to take this step?*



# Compare: IOGCC Approach

- Open issues:
  - *Capture*
  - *Transportation*



# State Approaches: Wyoming

- Passed two CCS statutes on March 4, 2008
  - *Effective July 1*
- HB 89: Addresses property rights issues
  - *Looking forward, vests pore space ownership with surface owner*
  - *Pore space to run with surface estate unless previously severed or excluded*
  - *Looking backward, presumption of same; rebuttable by preponderance of evidence*
  - *Pore space owner “shall have no right to use the surface estate beyond that set out in a properly recorded instrument.”*



# State Approaches: Wyoming

- HB 90 creates legislative framework for injection, storage
  - Gives WYDEQ permitting authority over injection and storage projects (excluding EOR projects, unless converted)
  - Permitting to occur within existing UIC program; new well “subclasses” contemplated
  - Bonding, financial assurance to be required for closure and post-closure; extent and time period yet to be determined (proposal due September 2009)
  - Does not address:
    - Operator “release” from long-term site obligations or ownership of CO<sub>2</sub>
    - Potential risks under existing environmental regulatory schemes
    - Tort/common law risks
  - Effect of EPA rules?
    - Potential issues of state primacy/authorization
    - Potential conflicts with future “minimum” federal standards



# Other States

- California
  - Tussling with CCS under AB 32 implementation
- Texas
  - *FutureGen: took liability*
  - *New severance tax relief for anthropogenic CO<sub>2</sub>-EOR: set a permanence standard*
- Illinois
  - *FutureGen: took liability*
- Washington
  - *Engaged in rulemaking*
- Others



# Liability

- **Must be addressed**
  - *Is CO<sub>2</sub> a commodity or something else?*
  - *Potential risks of triggering CERCLA, RCRA, SDWA, citizen suit provisions, etc.*
  - *Common law torts*
  - *Private market solutions may be inadequate or unavailable (e.g., insurance)*
- **What are some legal/regulatory options?**
  - *Government taking title*
  - *Specific exemptions (statutory)*
  - *Permit shields (statutory)*
  - *Tort reform (common law)*



# Ownership

- Who owns the pore space?
  - *Several types of property rights potentially implicated:*
    - *Pore space*
    - *Surface (and subsurface) use and access*
    - *Mineral rights*
  - “Creation” of new rights: inflated value?
  - Issues regarding newly-impacted property over project life



# Resolution of Ownership Issues

- Default: jurisdiction- and transaction-specific analysis of applicable property rights
- “Wyoming approach:” Pass a new law
- Clear, defensible eminent domain authority at state and perhaps federal level



# Quick Look at Eminent Domain in Montana

- Eminent domain may be employed for “public use”
  - *Specific uses listed in the state, and uses are strictly construed, according to the case law*
  - *CO<sub>2</sub> storage could be added as a public use*
- State owns underground waters
  - *Helpful for deep saline?*



# Costs

- Who is going to pay for all of this?
  - *Private sector or the public sector*
  - *If CCS is being done for a public good, public funding or support would appear to be appropriate at some level*



# Who is Alston + Bird LLP?

- National law firm (800+ attorneys) with focus on energy projects and policy
- Particular expertise in CCS, CO<sub>2</sub>-EOR
  - *Policy: Founder, North American CCS Association; represent other interests significant policy interests*
  - *Projects: Represent numerous project developers of CCS-related projects*
  - *Finance: Carbon finance, trading, M&A*
- Speaking today in a personal capacity
  - *Views expressed are solely my own*
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